Harapan Permai Sdn Bhd v Sabah Forest Industries Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02–43 OF 2007
LOW HOP BING, MOHD HISHAMUDIN AND CLEMENT SKINNER JJCA
1 AUGUST 2010

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Civil Procedure — Pleadings — Striking out statement of claim — Abuse of process of court — Meaning of — Allegation of breach of contract — Whether claim abuse of process of court — Rules of the High Court 1980 O 18 r 19(1)(d)

D

Civil Procedure — Pleadings — Striking out statement of claim — Disclosing no reasonable cause of action — Meaning of — Whether affidavit evidence admissible — Allegation of breach of contract — Whether statement of claim disclosed reasonable cause of action — Rules of the High Court 1980 O 18 r 19(1)(a)

E

Civil Procedure — Pleadings — Striking out statement of claim — Scandalous, frivolous or vexatious — Meaning of — Allegation of breach of contract — Whether claim scandalous, frivolous or vexatious — Rules of the High Court 1980 O 18 r 19(1)(b)

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The respondent ('defendant') was the holder of a special timber licence to fell, convert and extract timber from a timber concession area ('the concession'). By timber sale agreement ('the agreement'), the defendant contracted to sell to the appellant ('plaintiff') merchantable timber logs extracted from the concession. Pursuant to the agreement, the defendant gave an irrevocable power of attorney ('the PA') to Ritai Sdn Bhd to manage and superintend the extraction of the timber. The plaintiff paid a total sum of RM7m to the defendant as advance payments towards the purchase of the timber logs. The defendant later refunded the advance payments to the plaintiff, rescinded the agreement and revoked the PA on the ground that the agreement and the PA were illegal. The defendant claimed that the agreement and PA were in contravention of s 24(6) of the Sabah Forest Enactment 1968 ('s 24(6)') since the effect of the whole arrangement was to transfer or assign the defendant's rights in the special timber licence to the plaintiff for a stated consideration. The plaintiff then commenced this action against the defendant, seeking a declaration that the agreement and the PA were still valid and subsisting. The plaintiff also prayed for specific performance thereof and alternatively, for damages. The defendant applied under O 18 r 19(1)(a), (b) or (d) of the Rules of the High Court 1980 to strike out the plaintiff's writ of summons and statement of claim. The

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defendant's application was dismissed by the learned registrar. The defendant's appeal against that decision was allowed by the learned judicial commissioner who struck out the plaintiff's action. Hence this appeal. The issue for determination was whether the issue of illegality raised by the defendant in relation to the timber transactions herein was so plain and obvious as to attract the application of O18 r 19(1)(a), (b) or (d).

Held, allowing the appeal with costs:

(1) (per **Low Hop Bing JCA**) In considering the defendant's ground under O 18 r 19(1)(a), no affidavit evidence was admissible. The court must consider only the pleadings for the purpose of determining whether the plaintiff's statement of claim discloses a reasonable cause of action. The expression 'reasonable cause of action' means 'simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person'. The test to be applied is whether on the face of the pleadings, the court is prepared to say that the cause of action is obviously unsustainable. The plaintiff's statement of claim averred a breach of contract based on the timber transactions between the parties, arising from the legal documents executed by them. It certainly disclosed a reasonable cause of action. Hence, the defendant's ground under O 18 r 19(1)(a) was unmeritorious (see paras 14–15).

(2) (per **Low Hop Bing JCA**) In the context of O 18 r 19(1)(b), the word 'scandalous' means wholly unnecessary and irrelevant, and not just unpleasant allegations. A pleading is 'frivolous or vexatious' when it is obviously unsustainable. The plaintiff action was not wholly unnecessary and irrelevant. Hence, it did not come within the scope of the words 'scandalous, frivolous or vexatious' (see para 17).

(3) (per **Low Hop Bing JCA**) An 'abuse of the process of the Court' arises under O 18 r 19(1)(d) where the process of the court has not been used in a bona fide manner and has been abused. The defendant's reliance on the 'intention and purpose' of the parties to show illegality could hardly be resolved by way of affidavits only. The plaintiff's action sought to enforce its rights and pursue its obligations under the agreement and PA. This was a legitimate means. The plaintiff's enforcement of these rights would involve several issues of law and fact, which required mature consideration via viva voce evidence. It was thus unsafe and unsound to conclude that the plaintiff's claim was an abuse of the process of the court, especially where the court was asked to decide on the issue of illegality (see paras 18 & 21).

(4) (per **Low Hop Bing JCA**) The plaintiff's claim was not obviously unsustainable and therefore did not attract the application of any of the paragraphs housed in O 18 r 19(1)(a), (b) or (d) (see para 32).

(5) (per **Mohd Hishamudin JCA**) The learned judicial commissioner was correct in allowing the appeal before her. She was correct in her findings that the transactions amounted to a transfer or an assignment of the licence from the defendant to the plaintiff. There was a contravention of s 24(6) the effect of which was to render the agreement and the PA illegal and invalid (see paras 52–53).

[Bahasa Malaysia summary

Responden ('defendan') merupakan pemegang lesen khas kayu balak untuk menebang, mengubah dan mengeluarkan kayu balak daripada kawasan konsesi kayu balak ('konsesi tersebut'). Melalui perjanjian jualan kayu balak ('perjanjian tersebut'), defendan membuat kontrak untuk menjual kepada perayu ('plaintif') kayu balak yang boleh dagang yang dikeluarkan dari konsesi tersebut. Menurut perjanjian tersebut, defendan telah memberikan surat kuasa wakil tak boleh batal ('SKW') kepada Ritai Sdn Bhd untuk menguruskan dan mengawalselia pengeluaran kayu balak. Plaintif telah membayar sejumlah RM7 juta kepada defendan sebagai bayaran ansuran terhadap belian kayu balak tersebut. Defendan kemudian telah membayar balik bayaran ansuran kepada plaintif, membatalkan perjanjian tersebut dan membatalkan SKW atas alasan bahawa perjanjian dan SKW tersebut adalah menyalahi undang-undang. Defendan mendakwa bahawa perjanjian dan SKW tersebut adalah bertentangan s 24(6) Enakmen Hutan Sabah 1968 ('s 24(6)') oleh sebab kesan keseluruhan urusan adalah untuk memindahkan atau menyerahkan hak-hak defendan dalam lessen khas kayu balak kepada plaintif bagi balasan yang dinyatakan. Plaintif seterusnya telah memulakan tindakan ini terhadap defendan, memohon deklarasi bahawa perjanjian dan SKW tersebut masih sah dan berkuat kuasa. Plaintif juga memohon untuk pelaksanaan spesifik dan secara alternatif, untuk ganti rugi. Defendan memohon di bawah A 18 k 19(1)(a), (b) atau (d) Kaedah-Kaedah Mahkamah Tinggi 1980 untuk membatalkan writ saman plaintif dan penyataan tuntutan. Permohonan plaintif telah ditolak oleh pendaftar yang bijaksana. Rayuan defendan terhadap keputusan tersebut telah dibenarkan oleh pesuruhjaya kehakiman yang bijaksana yang membatalkan tindakan plaintif. Justeru itu rayuan ini. Isu untuk penentuan adalah sama ada isu kepenyalahan undang-undang yang dibangkitkan oleh defendan berkaitan pemindahan kayu balak adalah biasa dan jelas untuk A 18 k 19(1)(a), (b) atau (d).

Diputuskan, membenarkan rayuan dengan kos:

(1) (oleh **Low Hop Bing HMR**) Dalam mengambilkira alasan defendan di bawah A 18 k 19(1)(a), tiada keterangan afidavit yang boleh diterima. Mahkamah patut hanya mengambikira pliding-pliding bagi tujuan menentukan sama ada penyataan tuntutan plaintif menunjukkan kausa tindakan yang munasabah. Ungkapan 'reasonable cause of action' bermaksud 'simply a factual situation the existence of which entitles one

person to obtain from the court a remedy against another person'. Ujian yang perlu digunapakai adalah sama ada berasaskan pliding itu, mahkamah bersedia mengatakan bahawa kausa tindakan jelas tidak boleh dikekalkan. Penyataan tuntutan plaintif menegaskan berlaku pelanggaran kontrak berdasarkan pemindahan kayu balak antara pihak-pihak, yang timbul daripada dokumen-dokumen sah yang disempurnakan oleh mereka. Ia jelas menunjukkan kausa tindakan yang munasabah. Justeru itu, alasan defendan di bawah A 18 k 19(1)(a) tidak bermerit (lihat perenggan 14–15).

(2) (oleh **Low Hop Bing HMR**) Dalam konteks A 18 k 19(1)(b), perkataan 'scandalous' bermaksud pengataan-pengataan yang secara menyeluruh tidak wajar dan tidak relevan, dan sememangnya tidak menyenangkan. Pliding itu 'frivolous or vexatious' apabila ia dengan jelas tidak boleh dikekalkan. Tindakan plaintif itu secara menyeluruh adalah tidak wajar dan tidak relevan. Justeru itu, ia tidak jatuh di bawah skop perkataan-perkataan 'scandalous, frivolous or vexatious' (lihat perenggan 17).

(3) (oleh **Low Hop Bing HMR**) Satu 'abuse of the process of the court' yang timbul di bawah A 18 k 19(1)(d) adalah di mana proses mahkamah tidak digunakan secara bona fide dan telah disalahgunakan. Kebergantungan defendan atas 'intention dan purpose' pihak-pihak untuk menunjukkan kepenyalahan undang-undang sukar diselesaikan melalui afidavit sahaja. Tindakan plaintif adalah memohon untuk menguatkuasakan hak-haknya dan meneruskan tanggungjawabnya di bawah perjanjian dan SKW tersebut. Ini merupakan cara yang sah. Penguatkuasaan hak-hak plaintif tersebut akan melibatkan beberapa isu-isu undang-undang dan fakta, yang memerlukan pertimbangan yang wajar melalui keterangan viva voce. Oleh itu adalah tidak selamat dan tidak munasabah untuk memutuskan bahawa tuntutan plaintif adalah satu penyalahgunaan proses mahkamah, khususnya di mana mahkamah diminta memutuskan tentang isu kepenyalahan undang-undang (lihat perenggan 18 & 21).

(4) (oleh **Low Hop Bing HMR**) Tuntutan plaintif tidak jelas tidak boleh dikekalkan dan oleh itu tidak menarik pemakaian apa-apa perenggan termaktub dalam A 18 k 19(1)(a), (b) atau (d) (lihat perenggan 32).

(5) (oleh **Mohd Hishamudin HMR**) Pesuruhjaya kehakiman yang bijaksana adalah betul dalam membenarkan rayuan di hadapan beliau. Beliau membuat penemuan yang betul bahawa pemindahan-pemindahan tersebut membentuk pindahhak atau serahhak lessen daripada defendan kepada plaintif. Percanggahan terhadap s 24(6) telah memberi kesan yang mengakibatkan perjanjian dan SKW tersebut menyalahi undang-undang dan tidak sah (lihat perenggan 52–53).]

Notes

For cases on striking out statement of claim, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 6386–6439.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Boey Oi Leng (t/a Indah Reka Construction & Trading) v Trans Resources Corporation Sdn Bhd [2001] MLJU 566; [2001] 4 AMR 4807, HC (refd)

Chu Yin Foh v Superwood Sawmill (S) Sdn Bhd [1999] MLJU 130 [1999] 1 LNS 15, HC (refd)

Cynsan Development Sdn Bhd v Majunis Tumpi & Ors [1997] 3 CLJ 396, HC (refd)

Gabriel Peter & Partners (suing as a Firm) v Wee Chong Jin & Ors [1998] 1 SLR 374, CA (refd)

Government of Malaysia v Lim Kit Siang [1988] 2 MLJ 12, SC (refd)

Hadi bin Hassan v Suria Records Sdn Bhd & Ors [2005] 3 MLJ 522, HC (refd)

Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen, Judge, High Court Malaya & Anor [2008] 2 MLJ 11; [2008] 2 AMR 6, CA (refd)

Kilang Papan Kuala Kangsar Sdn Bhd lwn Koperasi Serbaguna Bekas-Bekas Polis Perak Bhd [1995] MLJU 232; [1995] 3 CLJ 697, HC (refd)

Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565, FC (refd)

Letang v Cooper [1965] 1 QB 232; [1964] 2 All ER 929, CA (refd)

Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd [1971] 2 MLJ 161, FC (refd)

Manharlal Bhaichand Gathani v Perwira Habib Bank (M) Bhd [2002] 2 MLJ 139, CA (refd)

Nam Seng Co v Wing Yew (Tawau) Co Sdn Bhd [1978] 2 MLJ 198, FC (refd)

New Straits Times (Malaysia) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] 1 MLJ 226, FC (refd)

Sabah Forest Industries Sdn Bhd v UNP Plywood Sdn Bhd [2010] 1 MLJ 765; [2009] 6 CLJ 515, FC (refd)

Sabah Forest Industries Sdn Bhd v UNP Plywood Sdn Bhd [2010] 4 MLJ 483; [2010] 3 CLJ 779, FC (refd)

Sundang Timber Co Sdn Bhd v Kinabatangan Development Co Sdn Bhd [1977] 2 MLJ 200, FC (refd)

Tan Bing Hock v Abu Samah [1967] 2 MLJ 148, HC (refd)

UNP Plywood Sdn Bhd v Sabah Forest Industries Sdn Bhd [2007] MLJU 39; [2007] 2 CLJ 665, HC (refd)

UNP Plywood Sdn Bhd v Sabah Forest Industries Sdn Bhd [2009] 1 MLJ 79; [2008] 4 CLJ 873, CA (refd)

Young v Bristol Aeroplane Company, Limited [1944] KB 718, CA (refd)

Legislation referred to

Forest Enactment 1968 ss 15, 24, 24(6)
Forest Rules 1969 r 3, Schedule III
Rules of the Federal Court 1995 r 137
Rules of the High Court 1980 O 18 r 19(1), 19(1)(a), (b), (d), O 92 r 4

Appeal from: Suit No K22–41 of 1997 (High Court, Sabah and Sarawak)

Alvin John (Lim Pitt Kong with him)(PK Lim & Co) for the appellant.
Cyrus Das (Norbert Yap and Celestina Stuel Galid with him) (Jayasuriya Kah & Co) for the respondent.

Low Hop Bing JCA (delivering majority judgment):

APPEAL

[1] On 17 May 1997, the respondent ('the defendant') applied to the learned registrar of the Kota Kinabalu High Court by way of summons in chambers under O 18 r 19(1)(a), (b) or (d) of the Rules of the High Court 1980 to strike out the appellant's ('the plaintiff's') writ of summons and statement of claim. The defendant's application was dismissed by the learned registrar.

[2] The respondent's ('the defendant's') appeal against the above decision was allowed by the learned judicial commissioner who then struck out the plaintiff's action.

[3] Being dissatisfied, the plaintiff appealed to this court. We heard the appeal on 17 March 2010 and arrived at a majority decision. Low Hop Bing and Clement Allan Skinner JJCA concurred, while Mohd Hishamudin bin Mohd Yunus JCA dissented. We now give the grounds of the majority judgment.

FACTUAL BACKGROUND

[4] On 11 April 1997, the plaintiff issued a writ of summons and statement of claim against the defendant, seeking a declaration that the timber sale agreement in writing dated 9 November 1992 entered into between the defendant and the plaintiff; and the irrevocable power of attorney of the same date ('the PA'), given by the defendant appointing Ritai Sdn Bhd as attorney, are still valid and subsisting. The plaintiff also prayed for specific performance thereof; alternatively, for damages, interests and costs.

[5] The defendant was the holder of a *Special Timber Licence No SK7/90* issued by the Director of Forestry, Sabah for and on behalf of the Government

of the State of Sabah on 26 October 1990 to fell, convert and extract timber from a timber concession area consisting of approximately 258,584 hectares of timber land situated in the Forest District of Sipitang ('*the concession*'). The licence was for a period of five years expiring on 25 October 1995.

[6] By a timber sale agreement dated 9 November 1992, the defendant contracted to sell solely and exclusively to the plaintiff all merchantable timber logs extracted from approximately 13,984 hectares of the licence area, earmarked in the concession, upon the terms and conditions contained therein.

[7] Pursuant to the timber sale agreement:

(a) The defendant gave the PA and appointed Ritai Sdn Bhd as its attorney with powers to, inter alia, manage and superintend the extraction and removal of merchantable timber therefrom and to enter into contracts and arrangements of all kinds in relation thereto and to generally exercise the powers granted therein; and

(b) Under the 'Mutual Letter of Undertaking' executed between the plaintiff and the defendant on 11 November 1992, the plaintiff paid a total sum of RM7m (RM3.5m on 9 November 1992 and RM3.5m on 12 May 1993) to the defendant as advance payments towards the purchase of merchantable timber logs from the defendant. The advance payments had been refunded to the plaintiff on 29 March 1995.

[8] On 22 August 1994, by letter to the plaintiff, the defendant rescinded the timber sale agreement and revoked the PA, on the ground that the timber sale agreement and the PA are illegal, allegedly being in contravention of s 24(6) of the Sabah Forest Enactment 1968 ('s 24(6)').

ILLEGALITY

[9] Learned counsel Dato' Dr Cyrus Das (assisted by Mr Norbert Yap and Ms Celestina Stuel Galid) submitted for the defendant that the transactions between the parties herein are illegal in that they have contravened s 24(6), as the effect of the whole arrangement is to transfer or assign the defendant's rights in the Special Timber Licence (SK 7/90) to the plaintiff for a stated consideration. Reference was made to:

(a) *Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd* [1971] 2 MLJ 161 (FC);

(b) *Sundang Timber Co Sdn Bhd v Kinabatangan Development Co Sdn Bhd* [1977] 2 MLJ 200 (FC);

(c) *Tan Bing Hock v Abu Samah* [1967] 2 MLJ 148 (HC);

(d) *Cynsan Development Sdn Bhd v Majunis Tumpi & Ors* [1997] 3 CLJ 396 (HC);

(e) *Chu Yin Foh v Superwood Sawmill (S) Sdn Bhd* [1999] MLJU 130; [1999] 1 LNS 15 (HC); and

(f) *Kilang Papan Kuala Kangsar Sdn Bhd lwn Koperasi Serbaguna Bekas-Bekas Polis Perak Bhd* [1995] MLJU 232; [1995] 3 CLJ 697 (HC).

[10] The plaintiff's learned counsel Mr Alvin John (Mr Lim Pitt Kong with him) subscribed to the view that the issue of illegality under s 24(6) has to be decided after a full trial and should not be summarily disposed of under O 18 r 19(1)(a), (b) or (d). They relied on *UNP Plywood Sdn Bhd v Sabah Forest Industries Sdn Bhd* [2007] MLJU 39 [2007] 2 CLJ 665 (HC); and the appeals therefrom to the Court of Appeal and the Federal Court.

[11] The issue for our determination may be formulated as follows:

> Given the above factual background, and in view of s 24(6) as well as the above authorities cited for the parties, is the issue of illegality, raised by the defendant in relation to the timber transactions between the parties herein, so plain and obvious as to attract the application of O 18 r 19(1)(a), (b) or (d)?

[12] In our view, the applicant ie the defendant herein bears the burden of proving that the application comes within the ambit of O 18 r 19(1)(a), (b) or (d). The defendant must discharge the burden by establishing that the issue of illegality comes within one of the grounds housed in O 18 r 19(1)(a), (b) or (d).

[13] In *Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen, Judge, High Court Malaya & Anor* [2008] 2 MLJ 11 at p 25; [2008] 2 AMR 6 at pp 21 and 22, in delivering the judgment of this court, I said:

> [37] There is plethora of weighty authorities setting out trite principles governing an application under O 18 r 19(1). It has been consistently stated by our courts that any pleading may be struck out if it is obviously unsustainable. Such discretionary power may only be exercised in plain and obvious cases: see eg *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1; *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 2 AMR 1969; *Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors* [1996] 1 MLJ 309; [1996] 1 AMR 162; *Sim Kie Chon v Superintendent of Pudu Prison & Ors* [1985] 2 MLJ 385; and *Haji Hussin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors and connected cases* [1983] 2 MLJ 227.

[14] In considering the defendant's ground under O 18 r 19(1)(a), ie *that the plaintiff's pleading discloses no reasonable cause of action*, we do not have to look at the affidavits as no such evidence shall be admissible: O 18 r 19(2). We must consider only the pleadings for the purpose of determining whether, in the instant appeal, the plaintiff's statement of claim discloses a reasonable cause of action. The expression 'reasonable cause of action' means 'simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person': per Diplock LJ in *Letang v Cooper* [1965] 1 QB 232 at p 242; [1964] 2 All ER 929 at p 934. The test to be applied is whether on the face of the pleadings, the court is prepared to say that the cause of action is obviously unsustainable: see eg *New Straits Times (Malaysia) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226 (FC); and *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 (SC).

[15] Pursuant to O 18 r 19(1)(a), our perusal of the plaintiff's statement of claim shows that it avers a breach of contract based on the timber transactions between the parties, arising from the legal documents executed by them. It certainly discloses a reasonable cause of action. Hence, the defendant's ground under O 18 r 19(1)(a) is unmeritorious.

[16] In examining the defendant's ground under O 18 r 19(1)(b) ie that the plaintiff's action 'is *scandalous, frivolous or vexatious' or (d)* ie that 'it is otherwise *an abuse of the process of the Court*', we are entitled to refer to affidavits.

[17] In the context of O 18 r 19(1)(b), the word 'scandalous' means wholly unnecessary and irrelevant, and not just unpleasant allegations: *Boey Oi Leng (t/a Indah Reka Construction & Trading) v Trans Resources Corporation Sdn Bhd* [2001] MLJU 566; [2001] 4 AMR 4807 (HC). A pleading is 'frivolous or vexatious' when it is obviously unsustainable. In the light of the factual background as alluded to above, we are of the view that the action instituted by the plaintiff against the defendant is not wholly unnecessary and irrelevant. Hence, it cannot be said to have come within the scope of the words 'scandalous, frivolous or vexatious'.

[18] An '*abuse of the process of the Court*' arises under O 18 r 19(1)(d) where the process of the court has not been used in a bona fide manner and the process has been abused: see eg *Gabriel Peter & Partners (suing as a Firm) v Wee Chong Jin & Ors* [1998] 1 SLR 374 at p 384 (CA); *Desa Saujana Corporation Sdn Bhd & Ors*; and *Hadi bin Hassan v Suria Records Sdn Bhd & Ors* [2005] 3 MLJ 522 (HC). In this context, it is appropriate for us to examine the issue of illegality and s 24(6) raised for the defendant.

[19] Section 24(6) reads:

> A licence shall be personal to the holder thereof and shall not be transferable in any manner whatsoever, and shall cease to be valid on the death of such holder or if such holder is declared to be insolvent under the provisions of any written law.

[20] The issue of illegality must be seen in the light of para 7 of the defendant's affidavit in support, where it was deposed that 'at the material time the intention and purpose of the parties entering into the purported timber sale agreement was for the defendants to assign absolutely to the plaintiffs all the defendants' rights under the said area comprising 13,984 hectares for a total cash consideration of RM7 million'.

[21] The defendant's reliance on the '*intention and purpose*' of the parties to show illegality can hardly be resolved by way of affidavits only. The plaintiff's action sought, inter alia, to enforce its rights and pursue its obligations under the aforesaid agreements and PA. This is a legitimate means. The plaintiff's enforcement of these rights would involve several issues of law and fact, which require mature consideration via viva voce evidence. Such evidence is to be adduced through the process of examination-in-chief, cross-examination and re-examination: see eg *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 (FC). It is both unsafe and unsound to conclude that the plaintiff's claim is an abuse of the process of the court, especially in the instant appeal where we are asked to decide on the issue of illegality.

[22] We would now embark on a consideration of the authorities relied on by the parties herein. We wish to state categorically that *the majority of the authorities cited for the defendant* are not concerned with the summary procedure under O 18 r 19(1). The issue of illegality raised therein had been disposed of only after a full trial. We have no hesitation in concluding that they actually militate against the substratum of the defendant's contention based on O 18 r 19(1).

[23] By way of elaboration, in *Lo Su Tsoon Timber Depot*, the appeal to the Federal Court arose from the judgment of the High Court after a full trial. The learned trial judge held that in the agreement assigning rights in a licence for timber extraction, there was no fraud and that there was good consideration. The point of illegality was raised for the first time before the Federal Court and the judicial pronouncement in relation to the issue of illegality was not based on O 18 r 19(1).

[24] In *Sundang Timber Sdn Bhd*, the issue of illegality was raised at the trial before the High Court. Counsel for both parties agreed to take this issue as a preliminary point under O 25 r 2 of the (then) Rules of the Supreme Court.

Consequently, the learned trial judge ruled that the timber transaction between the parties therein was illegal. On our part, we are of the view that *Sundang Timber Sdn Bhd*, contains two distinguishing features viz there was a full trial, and the parties had agreed to invoke the (then) O 25 r 2 to argue the issue of illegality as a preliminary point. That judgment has no nexus with an O 18 r 19(1) situation.

[25] The matter raised in *Tan Bing Hock*, before the High Court was a motion for an interim injunction to restrain the defendant from otherwise dealing, disposing etc of a forest area of 1,000 acres. In dismissing the application for interim injunction, on the ground that the agreement in question was null and void and illegal, Raja Azlan Shah J (now HRH the Sultan of Perak) made it clear that 'on a motion like this it is usually undesirable to examine the evidence in detail because it so often happens that at the trial of the action when the witnesses go into the witness box to give evidence and are cross-examined, the evidence appears in a different light from that in which it appears in cold print'. We pause here for a moment to observe that the issue of illegality was not resolved summarily under O 18 r 19(1).

[26] It is significant to note that in *Cynsan Development Sdn Bhd*, the issue of illegality was also resolved after a full trial and it was only after a careful evaluation of viva voce evidence that Richard Malanjum J (now CJ (Sabah and Sarawak)) arrived at an affirmative finding. Again, the determination on the issue of illegality was not based on O 18 r 19(1). His Lordship similarly disposed of the issue of illegality in *Chu Yin Foh*, after a full trial and not under O 18 r 19(1).

[27] Finally, in *Kilang Papan Kuala Kangsar Sdn Bhd*, the issue of illegality in a timber transaction was raised and O 18 r 19 was invoked to strike out the plaintiff's writ of summons and statement of claim. The learned registrar of the High Court allowed the defendant's application, and ordered the defendant to refund the sum of RM55,000 to the plaintiff pursuant to the agreement in question. On appeal, Abdull Hamid Embong JC (now FCJ) affirmed the orders made by the learned registrar. We respectfully observe that *Kilang Papan Kuala Kangsar Sdn Bhd*, must now be read in the light of the authorities cited for the plaintiff herein, which we would now analyse below.

[28] In *UNP Plywood Sdn Bhd v Sabah Forest Industries Sdn Bhd* [2007] MLJU 39; [2007] 2 CLJ 665 (HC), the issue of illegality was considered after a full trial. The facts therein are substantially similar to those in the instant appeal. The dispute involves the same defendant, same Special Timber Licence No SK 7/90 and the same area of 258,584 hectares. The same kind of legal documents viz the agreements for the extraction and purchasing of timber, and powers of attorney were granted. Only the plaintiff and the area for extraction

are different. One of the agreed issues for determination was whether the two agreements entered into by the parties therein viz (1) to allow the plaintiff to extract commercial timber therefrom; and (2) to permit the plaintiff to extract commercial timber logs from the forest area in question and the powers of attorney appointing the plaintiff as attorney to, inter alia, manage the extraction and sale of timber therefrom were illegal and void ab initio. After a full trial, Sulong Matjeraie J (now JCA) gave the answer in the affirmative.

[29] On appeal, sub nom *UNP Plywood Sdn Bhd v Sabah Forest Industries Sdn Bhd* [2009] 1 MLJ 79; [2008] 4 CLJ 873, the Court of Appeal, speaking through Gopal Sri Ram JCA (later FCJ) allowed the appeal, set aside the decision of the High Court and entered judgment in the appellant's (UNP Plywood Sdn Bhd's) favour for damages to be assessed. That judgment is illuminating. It provides a judicial landmark. It strikes at the very core of the question which we have to address in the instant appeal. It has established, inter alia, that the issue of illegality is an issue which is to be argued and resolved after a full trial. By way of analogy, it is clear that the application in the instant appeal, based on similar facts, is eminently unsuitable for disposal summarily under O 18 r 19(1)(a), (b) or (d).

[30] Sabah Forest Industries Sdn Bhd did not stop at the Court of Appeal, but had proceeded further to the Federal Court.

[31] For the sake of completeness, we would make a brief mention of the proceedings subsequent to the aforesaid Court of Appeal judgment. In the final appeal, sub nom *Sabah Forest Industries Sdn Bhd v UNP Plywood Sdn Bhd* [2010] 1 MLJ 765; [2009] 6 CLJ 515 (FC), the issue concerns the framing of the questions for determination by the Federal Court. In a judgment delivered by Augustine Paul FCJ (as he then was), the Federal Court ('the first coram') examined all the six questions that have been posed, and dismissed the appeal without considering the merits. The appellant, Sabah Forest Industries Sdn Bhd, subsequently invoked the 'review' procedure under r 137 of the Rules of the Federal Court 1995 to pray for an order from another coram of the Federal Court ('the second corum'), so as to set aside the judgment delivered by first coram. Zaki Tun Azmi CJ (Malaya) delivered the judgment for the second coram and dismissed the motion by Sabah Forest Industries Sdn Bhd: see *Sabah Forest Industries Sdn Bhd v UNP Plywood Sdn Bhd* [2010] 4 MLJ 483; [2010] 3 CLJ 779 (FC).

CONCLUSION

[32] On the facts and the law, we held that the learned registrar was correct in dismissing the defendant's application under O 18 r 19(1)(a), (b) or (d), while the learned judicial commissioner has erred. The plaintiff's claim is not

obviously unsustainable and therefore does not attract the application of any of the paragraphs housed in O 18 r 19(1)(a), (b) or (d). In the circumstances, we answered the aforesaid question in the negative. We therefore allowed this appeal, set aside the order of the learned judicial commissioner and remit the plaintiff's action to the High Court for an early trial. We awarded a sum of RM8,000 as costs to the plaintiff. The deposit is to be refunded to the plaintiff as appellant.

Mohd Hishamudin JCA (delivering dissenting judgment):

[33] This is an appeal by the appellant against the decision of the learned judicial commissioner of the High Court of Kota Kinabalu of 15 December 2006. The learned judicial commissioner had allowed the respondent's appeal against the decision of the learned deputy registrar given on 12 September 2003. The learned deputy registrar by her decision had dismissed the respondent's application before her pursuant to O 18 r 19(1) and O 92 r 4 of the Rules of the High Court 1980. Dissatisfied with the decision of the learned deputy registrar the respondent had appealed to the judge in chambers.

[34] The appellant was the plaintiff before the High Court whilst the respondent was the defendant.

[35] The writ of summons and the statement of claim were filed on 11 April 1997.

[36] The statement of defence was filed on 4 June 1997.

[37] The reply to the statement of defence was filed on 13 June 1997.

[38] The striking out (O 18 r 19(1) and O 92 r 4) application was filed on 17 May 1997.

[39] In October 1990 the respondent/defendant was issued a Special Timber Licence No SK7/90 by the Director of Forestry, Sabah. The licence was issued under s 24 of the Forest Enactment 1968 of Sabah ('Forest Enactment'). The licence covers an area of approximately 258,584 hectares ('the licence area') in the State of Sabah. The licence was for a period of five years expiring on 15 October 1995. The licence confers on the respondent the right to extract timber from the licence area.

[40] The licence area is in respect of an alienated land.

[41] On 9 November 1992 the respondent and the appellant/plaintiff entered into an agreement called 'timber sale agreement'. By this agreement the respondent sold to the appellant all the timber logs extracted from 13,984 hectares ('timber sale agreement area') of the licence area.

[42] In furtherance of the timber sale agreement, the respondent by an irrevocable power of attorney dated 9 November 1992 appointed the appellant as its attorney with certain powers. In summary, the power of attorney empowers the appellant to deal generally with the Forestry Department of Sabah and any other governmental authority in regard to the payment of royalties and other matters pertaining to the extraction of timber from the timber sale agreement area.

[43] On the same date that the respondent and the appellant made the timber sale agreement, the respondent entered into another agreement, but this time with a company called Ritai Sdn Bhd ('Ritai'). This company is very closely related to the appellant. The board of directors of these two companies comprised the same persons. The parties refer to the agreement entered into as the 'timber extraction agreement'. This timber extraction agreement gives Ritai the right to extract all the timber from the timber sale agreement area.

[44] In respect of the appellant company, the signatories of the timber sale agreement and the timber extraction agreement were the same people.

[45] In furtherance of the timber extraction agreement, the respondent by an irrevocable power of attorney dated 9 November 1992 appointed Ritai Sdn Bhd as its attorney with powers to, among others, to communicate with the Forestry Department on matters pertaining to the extraction of timber in the timber sale agreement area; to apply from the government departments concerned the requisite permits for the purpose of the extraction of timber and to carry out the extraction of timber in the said area; to apply for timber removal licences and passes in connection with the extraction and removal of timber from the said area; and to enter into contracts and arrangements of all kinds in relation to the extraction of timber in the said area.

[46] Under an agreement called the 'Mutual Letter of Undertaking' executed between the respondent and the appellant on the 9 November 1992, the appellant paid a sum of RM7m to the respondent as an advance payment for all the timber purchased by the appellant from the respondent pursuant to the timber sale agreement.

[47] By a letter of 22 August 1994 the respondent through its solicitors rescinded the timber sale agreement and revoked the power of attorney issued

to the appellant on the grounds that the agreement and power of attorney were illegal in that they contravened s 24(6) of the Forest Enactment.

[48] On 29 March 1995 the respondent refunded to the appellant the advance payment of RM7m.

[49] On 11 April 1997 the appellant commenced a writ action against the respondent for alleged wrongful repudiation of the timber sale agreement and revocation of the power of attorney.

[50] By a summons in chambers dated 17 May 1997 the respondent applied to strike out the appellant's claim under O 18 r 19(1) and the inherent jurisdiction of the court (O 92 r 4). The learned deputy registrar dismissed the application on 12 September 2003. The respondent appealed against the decision of the learned deputy registrar. As mentioned earlier, the learned judicial commissioner allowed the respondent's appeal on 15 December 2006; and the appellant's action was accordingly struck out with costs. Hence there is this appeal by the appellant.

[51] I am dismissing the appeal with costs. The following are my grounds.

[52] In my judgment the learned judicial commissioner was correct in allowing the respondent's appeal before her. She was correct in her findings that the transactions between the respondent and the appellant, the transactions between the respondent and Ritai, and the intimate relationship between the appellant and Ritai, when all viewed together, they all amounted to a transfer or an assignment of the licence from the respondent to the appellant. Based on the undisputed facts, I agree with the learned judicial commissioner that this is the irresistible conclusion.

[53] I accept the ruling of the learned judicial commissioner that there was a contravention of s 24(6) of the Forest Enactment the effect of which was to render the timber sale agreement and the power of attorney illegal and invalid (see *Nam Seng Co v Wing Yew (Tawau) Co Sdn Bhd* [1978] 2 MLJ 198). In *Nam Seng* it was an interlocutory application by the defendant to strike out the plaintiff's writ summons and action on the grounds that the claim was based on an illegal contract by reason of a breach of s 24(6) of the Forest Enactment. The High Court granted the application and the judgment of the High Court was, on appeal, upheld by the Federal Court.

[54] In arriving at her decision the learned judicial commissioner had referred to the relevant authorities. In her own words:

In cases of *Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd* [1971] 2 MLJ 161; *Sundang Timber Co Sdn Bhd v Kinabatangan Development Co Sdn Bhd* [1977] 2 MLJ 200 and *Nam Seng Co v Wing Yew (Tawau) Co Sdn Bhd* [1978] 2 MLJ 198 the court looked at the actual effect of the agreements in order to fathom the intention of the parties in executing the same. In all those cases, the court found that the agreements and power of attorney, in whatsoever manner they were cloaked, still had the actual effect of completely assigning away the rights of the timber licensee, which is in contravention of s 24(6) of the Forest Enactment 1968. In the case of *Cynsan Development Sdn Bhd v Majunis Tumpi & Ors* [1997] 3 CLJ 396 His Lordship Richard Malanjum J (as His Lordship CJ (Sabah and Sarawak then was) observed, inter alia:

(a) that before determining the legal status of such a transaction, the contents of the documents need to be scrutinised carefully to find the real effects on the parties:

(b) ...

(c) that allocating the various activities in the licensed area to several parties made no difference where the cumulative effect of the documents was the parting away of the interests or rights of a licensee under a timber licence issued …

[55] In my judgment the learned judicial commissioner had correctly identified the pertinent issues before her. This is clear from her well-written grounds of judgment. She said:

The primary issue before this court is whether the transaction between the plaintiff and the defendant is illegal in view of the provisions of s 24(6) of the Forest Enactment 1968. The provision is reproduced as below:

… (6) A licence shall be personal to the holder thereof and shall not be transferable in any manner whatsoever, and shall cease to be valid on the death of such holder or if such holder is declared to be insolvent under the provisions of any written law …

[56] She then proceeded to examine the relationship between the appellant and Ritai and the five pertinent documents (namely, the two agreements, the two powers of attorney and the mutual undertaking) and made the following findings:

Furthermore, having scrutinised 'CCS-11' which is the company search results on both the plaintiff and Ritai Sdn Bhd, it cannot be denied that both companies have the same common board of directors. Purely by visual comparison, the signatories for the timber sale agreement and the timber extraction agreement appear to be the same persons as well. This was the assertion by the defendant in their second affidavit in support which assertion was not denied by the plaintiff in their second affidavit in opposition.

Having found that all the documents listed above must be read together in order to arrive at the cumulative effect of their contents, I then considered the implications of the same upon the plaintiff and the defendant. The question which begs an

answer is this: Did the execution of the documents result in the defendant parting with all their interests in the timber licence for financial consideration? A

(i) The Timber Sale Agreement provided, inter alia, the following terms:

Clause 1

B

In consideration of the terms and conditions herein contained the company will sell solely and exclusively to the purchaser all the said Merchantable Timber Logs extracted from the said land and transported to and stored in a log pond or log ponds of the company in Sipitang, Sabah.

Clause 2 C

The selling price of the said Merchantable Timber Logs irrespective of species and grades hereby agreed to be sold by the company to the purchaser shall be Malaysian Ringgit One Hundred and Forty Three and Cents Fifty Only per cubic metre plus an amount equivalent to the royalties and other charges leviable on the same at the rate current at the time of the sale. D

Clause 5

The purchaser shall on behalf of the company pay to the Forestry Department, Sabah the following:- E

(a) Royalties

(b) Timber Development Charge (if any)

(c) Timber premium (if any)

F

Clause 6

Prior to the effecting payment under Clauses 4 and 5 hereof the purchaser shall on behalf of the company pay all extraction fees on the timber logs sold and purchased under this agreement which is due and payable to the contractor under the Company's Extraction Agreement with the said contractor. G

Clause 7

The purchaser shall be able to export the said Merchantable Timber Logs purchased under this agreement through the company's export quota and thereby no restriction shall be imposed on the said export quota nor shall there be any fees imposed on the purchaser for the use of the company's export quota … H

Clause 8

I

Royalty rebates with regard to royalty payment in Clause 5 hereof shall be made payable to the purchaser and in the event the rebates are made to the account of the company by the relevant state authority, the said rebate shall be deemed as debt due and payable by the company to the purchaser and the purchaser shall

A have the option to claim on the said debt and/or to contra against subsequent royalties payable to the Forestry Department, Sabah, Malaysia.

From a reading of the above clauses, it can be concluded that by this timber sale agreement, the plaintiff has effectively assumed control over all of the defendant's rights and obligations flowing from the timber licence in return for financial consideration. Coupled with cll 1–5 of the power of attorney and the letter of mutual undertaking there can be no doubt that it was the intention of the parties and the effect of the documents to completely assign away the defendant's rights and interests under the timber licence to the plaintiff with the consideration of RM7m. Both the irrevocable powers of attorneys were granted with full power to the donees to deal with all matters in connection with the licence until all merchantable timber from the said land shall have been fully extracted and sold by the plaintiff.

It is the plaintiff's contention that neither documents on the face of it mention the objective 'to fell, convert, and extract timber' hence it cannot be said that the defendant has assigned away their rights under the timber licence. With respect, I am unable to agree with learned counsel's submission. Affidavit and documentary evidence have shown that the plaintiff and the defendant executed the timber sales agreement and a power of attorney was also given to the plaintiff. The (defendant) had also at the same time signed a timber extraction agreement with Ritai Sdn Bhd and also gave a power of attorney to them allowing them to effectively assume all the rights and obligations accorded to the defendant under the timber licence. The link between the plaintiff and Ritai Sdn Bhd, as evidenced by the Forms 49 of both companies, are their common board of directors who were signatories for both agreements. Despite the plaintiff's protestations, there was no denying that fact. For all intent and purpose, there was no lifting of corporate veil. A casual scrutiny of the circumstances and documents would be sufficient to attract the irresistible conclusion that the plaintiff and Ritai Sdn Bhd are two entities which are intimately connected to one another. Had the transactions have continued to its natural conclusion, I have no doubt that the entire logging operation would have been under the control of the plaintiff and the defendant would '… merely sit back and collect the balance of their dues as agreed for parting with their rights thereunder …' (see *Cynsan*).

[57] In the appeal before this court, the appellant, by its written submission, submits as follows:

H 3. The LJC never legally and factually considered whether the Respondent's Timber Licence No. SK7/90 issued by the Director of Forestry on 16.10.1990 comes within the ambit of s. 24 of the Forest Enactment, 1968 and therefore caught by section 24(6) thereof which prohibits any assignment of such timber licence. This was the fundamental issue which the LJC ought to consider but failed to do so.

[58] Then the appellant proceeded to contend:

> 6. It goes without saying that if the Respondent's Timber Licence No. SK7/90 [See: ROA, pp 184 – 233] does not come within the scope of s. 24 of the Forest Enactment, 1968, then in such case, the Appellant's appeal ought to be allowed.

[59] During the oral submission before this court, during the appellant's reply submission, when queried by me, learned counsel for the appellant, Encik Alvin John, made it clear to the court that the appellant's position was that the licence issued to the respondent is a s 15 licence agreement and not a s 24 licence. He then went on to argue that there is nothing in s 15 of the Forest Enactment which prohibits the assignment of a licence agreement issued under that section.

[60] At this juncture I think it is appropriate that I should set out the provision of s 15 of the Forest Enactment (the provision as it stood in the year 1990, the year the licence was issued). It states:

> Acquisition of rights in Forest Reserve
>
> 15 (1) Save as otherwise provided in this Enactment and notwithstanding the provisions of any other State law, no right of any description in or over a Forest Reserve or any part thereof shall be acquired except by virtue, and in accordance with the terms of, a licence agreement entered into by the Minister or of a licence.
>
> (2) Any licence agreement entered into by the Minister under this section shall be subject to any admitted rights or conceded privileges and any special conditions attaching to the Forest Reserve concerned under the provisions of this Enactment, but subject thereto, where any provision of such licence agreement is inconsistent with any provision of this Enactment compliance with the provisions of such licence agreement shall be deemed to be compliance with the provisions of this Enactment;
>
> Provided that Forest Reserve of Class I and Class VI may not be licensed or caused to be licensed for taking out forest produce.

[61] It is to be observed from the above provision that a licence under s 15 or a licence agreement under s 15 can only be issued in respect of a forest reserve. And with regard to a licence agreement under s 15, it can only be issued by the Minister.

[62] Now it is important to recalled that in the case before this court the licence was issued by the Director of Forestry, and the licence area is not a forest reserve but an alienated land.

[63] Now, this being the position that Encik Alvin John takes (that the licence in the present case is a licence agreement under s 15), with respect, such a contention is rather startling. For this position contradicts the position taken by the appellant before the learned deputy registrar and the learned judicial commissioner at the High Court. For it is the position taken by the appellant all along in its pleadings that the licence is a s 24 licence. I refer to para 13 of the statement of claim that states:

> 13. At all material times, the said Agreement and /or the said Power of Attorney did not amount to an assignment of the said Licence and did not contravene Section 24 (6) of the Forest Enactment 1968 since the Defendant's special licence related solely to extraction of forest produce and not to its subsequent sale.

[64] To reiterate what I have stated earlier, nowhere in its statement of claim does the appellant rebut the position taken by the respondent that the licence was a s 24 licence (and that the appellant had contravened sub-s (6) of s 24). On the contrary, para13 of the statement of claim implies strongly that it is also the appellant's position that the licence was a s 24 licence. If, indeed, the position of the appellant is that the licence is a s 15 licence agreement, then para 13 would be the opportune moment to express that position in no uncertain terms. But, remarkably, not a word is mentioned either in the statement of claim or in the reply to the statement of defence to the effect that the licence was a s 15 licence agreement. I must add my observation that even the appellant's reply to the statement of defence strongly implies that the appellant takes the position that the licence is a s 24 licence (see paras 2, 9 and 23 of the reply to the statement of defence). Take para 23 of the reply as an example. This paragraph states:

> 23. … The presence of the Director of Forestry at the Defendant's Board of Directors meeting gives credence to the plaintiff's contention that the transaction between the Plaintiff and the Defendant [was] not tainted by illegality especially in the light of the fact that the prohibition under Section 24(6) of the Forest Enactment 1968 was in force at the material time and the Director of Forestry must obviously have directed his mind to this prohibition before consenting to the transaction.

[65] Further even in its affidavits in opposition (to the striking out application) and in its written submission before the learned judicial commissioner the appellant had taken the position that the licence was a s 24 licence.

[66] In short it is not in issue at all before the learned judicial commissioner that the licence was a s 24 licence. Indeed the licence itself states that it is a s 24 licence; for the licence ends in the following form:

In Witness Hereof, The Director for and on behalf of the Government of the State of Sabah and empowered by Section 4 and 24 of the Forest Enactment, 1968 has hereunder set his hand on this 26th day of October 1990.

[Illegible signature]

.....

Director of Forestry

[67] In my judgment, the licence was correctly issued by the Director under s 24 of the Forest Enactment as the land was an alienated land and not a forest reserve. Section 24 states (as the provision stood in 1990, the year the licence was issued):

Licences

24(1) Subject to the provisions of this Enactment, the Director or any person authorized by him in that behalf may issue licences for the doing of all or any of the acts prohibited by sections 20 and 23 of this Enactment upon such conditions and subject to the payment of such fees or royalties (if any) as may be prescribed or as may be specified in such licence.

(2) A licence unless sooner revoked or cancelled shall be valid for such period as may be specified therein.

(3) A licence relating to the doing of any act in a Forest Reserve shall not be expressed as being valid for a period exceeding five years, and if by mistake or otherwise such licence is expressed to be valid for a longer period or contains no period of validity it shall cease to be valid at the expiration of five years from the date of issue thereof.

(4) Where a licence relates to the doing of any act on State land other than a Forest Reserve —

(a) It shall not, without the written consent, either general or special, of the Director of Lands and Surveys, be valid for a period exceeding one year; and

(b) Notice of the issue thereof shall be given by the person by whom it was issued to the Assistant Collector of Land Revenue of the district in which the land concerned is situated.

(5) No licence shall be issued for the doing of any act on alienated land except on application by, or with the written permission of, the owner or lessee of such land.

(6) A licence shall be personal to the holder thereof and shall not be transferrable in any manner whatsoever, and shall cease to be valid on the death of such holder or if such holder is declared to be insolvent under the provisions of any written law.

[68] In my judgment it is clear in the present case that what was intended to be issued by the parties (meaning the Director and the licensee/respondent) is a licence under s 24 of the Forest Enactment and not a licence agreement under s 15 of the same. Firstly, a licence agreement under s 15 (as opposed to a mere licence) can only be issued by the Minister. It cannot be issued by the Director. On the other hand, a licence under s 24 can only be issued by the Director. It cannot be issued by the Minister. Secondly a licence agreement under s 15 cannot be entered into by the Minister in respect of an alienated land. It can only be entered into in respect of a forest reserve. Section 15 is very clear on this. There is no ambiguity at all. In the present case, there is no dispute at all that the licence area is alienated land and not a forest reserve. Thirdly, it is the intention of the State Director of Forestry and the respondent (the licensee) that the licence be issued under s 24 as this is clearly manifested by them when they have in the licence specifically referred to s 24 of the Forest Enactment, and that nowhere in the licence was s 15 of the Forest Enactment ever mentioned. It is, however, true that the licence is not in any of the forms as prescribed by Schedule III of the Forest Rules 1969. Instead, it is more in the form of an agreement. But just because the licence is not in the prescribed form but in the form of an agreement it is not, to my mind, opened to any party, particularly a party unconnected at all with the licence such as the appellant (putting aside the private agreements and the powers of attorney), to allege that the licence is a licence agreement under s 15. What is the basis for the appellant to so allege when s 15, in the first place, does not prescribe the format of a licence agreement under s 15? At best the appellant can only allege that the licence is invalid by reason of non-compliance with r 3 of the Forest Rules (for not being in the prescribed format). But, of course, such an argument is not opened to the appellant; for such an argument would only favour the respondent.

[69] Anyhow, going back to issue on the approach that had been taken by the appellant before the High Court, having taken the position before the learned deputy registrar and before the learned judicial commissioner that the licence was a s 24 licence, which position is the same as that taken by the respondent before the learned deputy registrar and learned judicial commissioner, it is now not opened to the appellant to take a contradictory or inconsistent position and to criticise the learned judicial commissioner before this court on appeal for not having considered ' … whether the respondent's Timber Licence No SK7/90 issued by the Director of Forestry on 16 October 1990 comes within the ambit of s 24 of the Forest Enactment 1968 … '; and to further allege in its written submission that:

> 5. The LJC pre-supposed and assumed that the said timber licence is simply caught by s. 24(6) of the Forest Enactment, 1968, which was a misdirection in law, and therefore, her decision cannot stand.

[70] Such a tactic is unfair and unethical. In fairness to the learned judicial commissioner, clearly she did not make any presupposition or assumption in her judgment. Her judgment is based on the common premise of parties that the licence was a s 24 licence.

[71] In the present case, it is not merely a case of raising a new ground on appeal: it is also a case of taking a contradictory (or inconsistent) position on appeal.

[72] On the above grounds alone the appeal ought to be dismissed (see *Manharlal Bhaichand Gathani v Perwira Habib Bank (M) Bhd* [2002] 2 MLJ 139 pertaining to the issue of raising a new ground on appeal).

[73] But there is another reason why the appellant's appeal ought to be dismissed. It is to be observed that the issue of the licence being a s 15 licence, and not a s 24 licence, is not only not raised in the appellant's pleadings or before the High Court (be it before the deputy registrar or before the learned judicial commissioner), it is also not raised in any of the grounds of the memorandum of appeal. Hence this 's 15 licence' argument ought not to be allowed at this appellate stage.

[74] However, despite the fact that the appellant is precluded from raising the issue (that the licence is a licence agreement under s 15 of the Forest Enactment) for the reasons given above, nonetheless, before this court learned counsel urges the court to consider his argument that the licence was a s 15 licence agreement. For the sake of being comprehensive in this judgment, I shall assume for the moment that the appellant may raise this issue before this court. Now, in his argument pertaining to s 15, learned counsel cites the Court of Appeal case of *UNP Plywood Sdn Bhd v Sabah Forest Industries Sdn Bhd* [2009] 1 MLJ 79; [2008] 4 CLJ 873, where the Court of Appeal deemed the licence issued in the case before it to be a s 15 licence agreement and not a s 24 licence although the licence had the same endorsement at the end of the licence just as in the present case. The reasons given by the Court of Appeal are these:

> [4] The respondent's case is that the licence in question was issued under s 24 of the Forest Enactment 1968. For this contention the respondent relied on the following endorsement at the foot of the timber licence (see at p 337 of Vol 2 of the record of appeal) as follows:
>
> > In Witness Hereof, The Director for and on behalf of the Government of the State of Sabah and empowered by Section 4 and 24 of the Forest Enactment, 1968 has hereunder set his hand on this 26th day of October 1990.
>
> [5] Under r 3 of the Forest Rules 1969 a licence issued under s 24 must be in Form I, Form IIA or Form IIB. The licence here is not in any of the said prescribed Forms. It is not correct to construe the timber licence as a s 24 licence just

because the Director says it is signed or issued under s 24. We are therefore unable to agree with this contention of the respondent.

[75] Thereafter, at para 9 of the judgment the Court of Appeal went on to hold:

> [9] So too here. We find that the agreements in the present instance do not amount to an assignment. In any event we would add that the licence issued to the respondent by the State does not prohibit assignment in any of its clauses. It is also pertinent to note that cl 19 of the licence held by the respondent provides for an arbitration between itself and the government in the event of any dispute. Arbitration clauses are normally found in contracts or agreements. Hence there is much force in the appellant's contention that the licence was a licence agreement under s 15 and not a licence under s 24 of the Enactment.

[76] Learned counsel for the appellant contends that on the authority of the Court of Appeal's decision in *UNP Plywood* this court ought to regard the licence in the present case as a licence agreement issued under s 15 notwithstanding that the licence was issued by the Director under s 24 of the Forest Enactment.

[77] With respect to learned counsel, this argument must also be rejected.

[78] With the greatest respect to the Court of Appeal in *UNP Plywood*, I am in agreement with Dato' Cyrus Das, learned counsel for the respondent, that the judgment of the Court of Appeal was per incurium. Firstly, a s 15 licence agreement (as opposed to a mere s 15 licence) can only be lawfully issued by the Minister. Legally, a licence agreement under s 15 cannot be issued by the Director. Secondly, in *UNP Plywood* the land in question was an alienated land but a s 15 licence agreement can only be issued in respect of a forest reserve, and not in respect of an alienated land. It is important to note that it is not stated anywhere in the judgment of the Court of Appeal in *UNP Plywood* as to whether the land in that case was an alienated land or was a forest reserve. Indeed, the judgment of the Court of Appeal is silent as to the status of the land in question (whether it is a forest reserve, or whether it is state land, or whether it is alienated land). Be that as it may, the matter went on appeal to the Federal Court; and it is from the Federal Court's judgment that one gets to know that the land in that case was an alienated land and not a forest reserve; for the Federal Court in its judgment in *Sabah Forest Industries Sdn Bhd v UNP Plywood Sdn Bhd* [2010] 1 MLJ 765; [2009] 6 CLJ 515 mentioned in passing that the land in question was alienated land. For at para 10 of its judgment it said (at p 773 (MLJ); 528 (CLJ)):

> … It must immediately be observed that Question Number 3 is not relevant as it relates to a transfer of rights or privileges in a forest reserve *while the land in this case is alienated land*. (Emphasis added.)

[79] In the Court of Appeal case of *UNP Plywood* the issue as to whether a licence agreement can lawfully be issued in respect of an alienated land was not an issue before the court. The Court of Appeal did not address its mind to this issue. Indeed, this issue was never raised at all before the Court of Appeal. But what happened was that, with the greatest respect, the Court of Appeal had (a) erroneously assumed that a licence agreement can lawfully be issued in respect of an alienated land; and (b) erroneously assumed that the Director may issue a licence agreement under s 15. The Court of Appeal did not consider the question as to whether the Director (as opposed to the Minister) can enter into a licence agreement under s 15. Likewise, this specific issue was not placed before the Court of Appeal for the court to consider. In *Nam Seng* Lee Hun Hoe CJ (Borneo) said (at p 200):

> Section 15 states clearly that no right of any description in a Forest Reserve can be acquired except (a) in accordance with the terms of a licence agreement entered into by the Minister or (b) by virtue of a licence. While a licence under s 24 can be issued by a conservator or his representative, a licence agreement can only be entered into by the Minister concerned under s 15. The definitions of 'licence' and 'licence agreement' under s 2 mentioned previously clarify the difference between the two. In the present case the purported licence agreement does not indicate that it was entered into by the Minister concerned.

[80] Hence, with respect, I do not propose to follow the Court of Appeal's decision in *UNP Plywood*. In *Young v Bristol Aeroplane Company, Limited* [1944] KB 718 it was held that a Court of Appeal is not bound to follow a decision of its own if it is satisfied that the decision was given per incurium, eg where a statute or a rule having statutory effect which would have affected the decision was not brought to the attention of the earlier court. This principle was cited with approval by our Supreme Court in *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12.

[81] Now, a few words need to be said of the Federal Court judgment in *Sabah Forest Industries Sdn Bhd v UNP Plywood Sdn Bhd*. The Federal Court in its conclusion said (at p 774 (MLJ) and p 529 (CLJ)):

> [15] The corollary is that none of the six questions that have been posed can be answered with the result that the appeal must be dismissed without a consideration of its merits.

[82] Hence as noted in the above passage the appellant's (at the Federal Court it was Sabah Forest Industries who was the appellant) appeal was

dismissed without consideration of its merits. Even then, with respect to the six questions posed to the Federal Court, none of them deal with the question as to whether a licence or licence agreement under s 15 of the Forest Enactment could be issued in respect of an alienated land; or with the question as to whether the Director (as opposed to the Minister) may enter into a licence agreement under s 15 of the Forest Enactment. Indeed, ultimately, the Federal decided not to answer any of the six questions posed to the court. It follows then that the Federal Court did not enunciate any principle at all that binds this court. (Subsequently the Federal Court rejected an application by Sabah Forest Industries pursuant to r 137 of the Rules of the Federal Court 1995 for the Federal Court to review its decision).

Appeal allowed with costs.

Reported by Kanesh Sundrum